No. 89-640

In The
Supreme Court of the United States
October Term, 1989

Manuel Lujan, Jr., Secretary of the Interior,
et al., Petitioners,
v.
National Wildlife Federation, *et al.,*
Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

[redacted]S

AMICI CURIAE AND BRIEF OF *AMICI CURIAE* NATIONAL CATTLEMEN'S ASSOCIATION, PUBLIC LANDS COUNCIL, AMERICAN SHEEP INDUSTRY ASSOCIATION, ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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MOTION OF NATIONAL CATTLEMEN'S ASSOCIATION, PUBLIC LANDS COUNCIL, AMERICAN SHEEP INDUSTRY ASSOCIATION, ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to this Court's Rule 42, the National Cattlemen's Association (NCA), Public Lands Council (PLC), American Sheep Industry Association (ASI), Rocky Mountain Oil and Gas Association (RMOGA), and the Independent Petroleum Association of America (IPAA) respectfully request the Court for leave to file the *amicus curiae* brief bound with this motion. Consent letters from Petitioners and Respondents accompany this filing.

The members of the *amici* organizations operate on or use resources from the public lands. Litigation concerning public land policies directly affects these members and *amici* can provide this Court with a unique perspective regarding the need for this Court to grant Petitioners petition for a writ of certiorari. Therefore, *amici* respectfully request that this Court grant the motion for leave to file this brief amici curiae.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* NATIONAL CATTLEMEN'S ASSOCIATION, PUBLIC LANDS COUNCIL, AMERICAN SHEEP INDUSTRY ASSOCIATION, ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, AND INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici curiae are five organizations whose members are directly involved in the use and management of natural resources on public lands. The members of each organization are often affected by litigation to stop development or economic uses of lands.

Amicus curiae National Cattlemen's Association (NCA) is a non-profit trade association speaking on behalf of all segments of the nation's beef cattle industry. The membership represents approximately 230,000 professional cattlemen. The NCA's basic purpose is to provide the beef cattle industry with an organization through which members work collectively to protect their industry and to solve industry problems in the national economy. A number of NCA members use public land resources through livestock grazing leases or permits and water development. These NCA members play an active role in the management of these leases and permits.

Amicus curiae Public Lands Council (PLC) is a non-profit organization representing 27,000 members who hold leases and permits to graze domestic livestock on federal land. In the western states, the scarcity of undeveloped private land makes public land use, either by grazing lease or grazing permit, an essential part of the ranch unit. PLC members actively manage these leases and permits.

Amicus curiae American Sheep Industry Association (ASI) is a non-profit organization representing 115,000

producers of wool and lamb. The association represents its members in legislative and regulatory matters. Additionally, the ASI promotes marketing efforts with research, education, and communication activities. Many ASI members also operate on federal land under the authority of grazing leases or permits. ASI members also actively manage these leases or permits for production of forage for livestock and wildlife.

Amicus curiae Rocky Mountain Oil and Gas Association (RMOGA) is a trade association representing hundreds of oil and gas operators, large and small, who explore for and produce oil and natural gas throughout the Rocky Mountain states of North Dakota, Montana, Wyoming, Colorado, Utah, Nebraska, South Dakota, and Idaho. The high percentage of federal lands in RMOGA's region gives RMOGA members a serious interest in federal land management. Access to federal lands to drill for oil and natural gas is fundamental to the industry's willingness and ability to explore for and develop oil and gas reserves on federal lands. A significant number of RMOGA members explore for and produce oil and gas on federal leases.

Amicus curiae Independent Petroleum Association of America (IPAA) represents the interests of approximately 10,000 independent oil and gas producers in the lower 48 contiguous states. The independents drill more than 90% of the exploratory wells in untested areas of the United States, many of which are on federal land. IPAA members produce a third of the total output of crude oil and natural gas in the United States and--perhaps most important--make 80% of the significant oil and natural gas discoveries in the United States. Access to federal land for exploration and development is also important to IPAA members.

Amici curiae have a direct interest in the question of whether an environmental group can prove standing on the basis of using the "vicinity of the area" that is the subject of the lawsuit. *Amici* members all rely on federal land resources for their livelihood. *Amici* have, in the past, suffered economic harm from lawsuits filed by environmental organizations attempting to prevent development, such as oil or natural gas drilling, by changing federal land policy. In order to defend the decisions made by federal agencies that were challenged in court, *amici* have had to intervene in these suits and to take other legal action.

This case involves how much of a personal stake in the controversy must advocacy organizations representing their members show before the issues can be addressed in federal court. Given the number of possible lawsuits and the resulting impact on public land management policy and future use of the public lands, this case is very important to *amici* members.

OPINIONS BELOW

The opinion of the court of appeals for the District of Columbia Circuit is reported at 878 F.2d 422. The opinion of the district court for the District of Columbia Circuit is reported at 699 F. Supp. 327. Prior opinions of the court of appeals for the District of Columbia Circuit are reported, respectively, at 835 F.2d 305 and

844 F.2d 889, while prior opinions of the district court for the District of Columbia Circuit are reported, respectively at 676 F. Supp. 371 and 676 F. Supp. 280.

SUMMARY OF ARGUMENTS

1. The decision of the court of appeals reduces the showing of interest for standing to sue below the minimum required by the United States Constitution. By removing the requirements that an organization show that its members have a personal stake in this litigation, the court of appeals permits any member of the public to challenge agency decisions without any personal involvement. The federal courts will be required to adjudicate public policy issues that are best left to the Executive Branch or Congress, becoming just another forum for public debate.

2. This decision will likely interfere with a wide range of economic activities on federal land, because it permits open-ended litigation to stop development by organizations lacking any personal interest in the case. The erosion of the standing doctrine will encourage public land litigation to limit development, including livestock grazing and oil and gas drilling done by *amici*.

STATEMENT OF THE CASE

Amici adopt the Petitioners' statement of the case and incorporate it herein by reference.

REASONS FOR GRANTING THE PETITION

I

THE DECISION OF THE COURT OF APPEALS ERODES PREVIOUS DECISIONS OF THIS COURT LIMITING JUDICIAL REVIEW OF AGENCY ACTION TO INSTANCES WHEN THE LITIGANT HAS A PERSONAL STAKE IN THE MATTER

This is a case involving the subject matter jurisdiction of the United States Federal Courts. The decision of the court of appeals has extended the possible interests that may have standing far beyond the limits framed by Constitutional and prudential standards established by this Court. This expansion will make the federal courts a forum for public policy debates over how the nation's public land should be used, without regard to whether the litigant has a real and personal stake in the controversy. The federal courts will thus intrude into matters already debated by the Executive Branch in violation of the tradition of separation of powers.

Article III of the Constitution establishes the jurisdiction of the courts by limiting "judicial Power. . . to all Cases [and]. . . Controversies." U.S. Const., art. III, § 2. The Administrative Procedure Act, 5 U.S.C. § 702, further limits the jurisdiction of the courts in determining disputes arising out of federal agencies to persons "suffering [a] legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute."

These limits on the power of the judiciary ensure that the courts are not asked to perform the functions of the Executive Branch or the Congress.

In *Valley Forge Christian College v. Americans United for the Separation of Church and State*, 454 U.S. 464, 472 (1982), this Court stated that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *citing Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). In the context of public land litigation, the Court held that merely an *interest* in "conservation" is not sufficient to permit standing. *Sierra Club v. Morton*, 405 U.S. 727, 730 (1972). Instead, the plaintiff must be "directly harmed." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 685 (1973).

The Respondents filed this lawsuit to oppose Petitioners' decisions to permit a wider range of lawful uses, such as water projects and oil and gas drilling, on the lands managed by the Bureau of Land Management (BLM) or the Forest Service. Respondents brought this public policy dispute into the federal courts without ever showing that a single member actually used any part of the 180 million acres of land involved in the case and would be harmed by the Petitioners' actions. Instead, Respondents came forward with members who used land in "the vicinity of " two tracts of BLM land several million acres in size.

The decision of the court of appeals permits any organization to litigate public land policy issues on the basis that they use land "in the vicinity of" the area and that the nearby land might, at some future point in time, be developed. By sharply reducing the personal stake required to invoke the jurisdiction of the federal courts, the court of appeals ensures that the federal courts will be asked to resolve issues more appropriately left to the Executive Branch or Congress.

No case decided by this Court permits standing when the party alleges a general injury--such as an interest in the aesthetic and recreational use of land "in the vicinity" of the land actually affected by agency action. The affidavit filed in this case illustrates the lack of a personal stake and the possible problems that will arise if this decision is permitted to stand without review. One of Respondents' members claimed to use land "in the vicinity of" a 2 million acre tract of land.[1] Put into perspective, it would take one person more than 54 years to use the land described in the affidavit, if that individual used 100 acres a day for those 54 years. Given the number of acres involved, it is noteworthy that Respondents could not even show that any member ever used the land in question. Such a claimed basis for standing makes a mockery of the requirement

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[1] Respondent's member filed an affidavit stating that she used federal lands for recreation and aesthetic enjoyment - especially those "in the vicinity of" South Pass - Green Mountain, Wyoming." Pet. App. 3. The district court found that this area is 2 million acres and only 2,000 acres were recently opened to mineral development. Pet. App. 10.

for a concrete, definable, and individualized injury for standing.

The standing doctrine requires evidence of a personal stake in the case to ensure that the federal court only addresses a specific dispute rather than simply second-guessing agency policy. Here, the Respondents effectively ask the federal court to assume the role of Secretary of Interior and reverse the more than twelve hundred or so agency decisions made over several years' time. This sweeping remedy should not be considered without evidence that Respondents' members use of the land to be protected is more precise than "in the vicinity of." The decision contradicts long-standing principles established by this Court and will undoubtedly lead to confusion in future cases.

II

THE POSSIBLE INCREASE IN LAWSUITS TO STOP DEVELOPMENT ON PUBLIC LAND WILL ADVERSELY AFFECT *AMICI* AND OTHER DEVELOPMENT INTERESTS THAT RELY ON ACCESS TO FEDERAL LAND

This case is not the first nor will it be the last one filed by advocacy organizations to change the federal government's land management policies.[2] The number

[2] Many such cases have directly affected how NCA, PLC, ASI, RMOGA, and IPAA members do business. In *NRDC* (continued...)

of these cases and the potential to do economic harm makes it imperative that these "representational" lawsuits involve real controversies and real people. The Constitutional requirements of standing are an important way to ensure that litigation does not simply repeat the public policy debates that occurred in the Department of Interior or the Forest Service before the agency decision was made.[3]

The use of public land in livestock grazing, timber harvest, mineral development, and skiing dominates the economies of most western states.[4] *Amici* represent

[2](...continued)
v. Hodel, 618 F. Supp. 848 (E.D. Cal. 1985), the district court set aside the cooperative grazing allotment management program under which many NCA, PLC and ASI members had signed agreements. In *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), the district court set aside the Forest Service's decision to issue leases and enjoined all development. Many RMOGA and IPAA members had leases that were challenged.

[3] Public participation occurs in a number of different proceedings: rulemaking, 43 U.S.C. § 1740, 16 U.S.C. § 1613, and 5 U.S.C. § 503, land use planning process, 43 U.S.C. § 1712(f); 16 U.S.C. § 1604(d), and under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, 40 C.F.R. § 1506.

[4] Under the Twenty-five Percent Act, all of the western states receive 25% of the revenues from National Forest land. 16 U.S.C. § 500. These revenues are from ski areas, timber sales, livestock grazing fees, and other revenue generating activities. Under the Federal Onshore Oil and Gas Leasing (continued...)

the agriculture and oil and gas industries. *Amici* members have often been affected by litigation challenging the agency decisions that enable a rancher to use federal land to graze his livestock, to build a water project, or that permit a company to drill for oil or natural gas.[5] Judge Williams in his dissent to an earlier opinion of the Court of Appeals in this case acknowledged the severe impacts of the preliminary injunction. "For commercial interest holders, an investment is tied up for an indefinite period, all chance of any return denied. *Cf. First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)."

Amici believe that such litigation is not appropriate as another form of public participation, unless actual persons are adversely affected. *Amici* must establish

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[4](...continued)
Reform Act, 30 U.S.C. § 191, 50% of the revenues from oil and gas leases on National Forest and BLM land are returned to the state. Federal lease revenues play a critical role in state and local government finances, especially in Wyoming,New Mexico, and Montana.

[5] In *NRDC v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), aff'd 527 F.2d 1386 (D.C. Cir.) *cert. denied* 427 U.S. 913 (1975) the district court changed livestock grazing and retained supervisory jurisdiction when it held that an environmental impact statement was required. *See also Sierra Club v. Watt*, 608 F. Supp. 305 (E.D.Cal. 1985) (setting aside the wilderness study area changes made by the Secretary of the Department of Interior and enjoining development inconsistent with wilderness study.); *NRDC v. Hughes*, 454 F. Supp. 148 (D.D.C. 1978) (enjoining coal leasing on federal lands until programmatic environmental impact statement is prepared.

their injury when they file suit. It is equally appropriate that environmental organizations carry the same burden of proving a personal stake in the agency decision to be contested. Unless the traditional standards for standing to sue are retained by granting review of this case, *Amici* are concerned that there will be no limits on the number and kind of lawsuits brought. Moreover, the federal courts will be converted into another forum for public participation, a role they are ill-equipped to play. *Amici* respectfully urge this Court to grant review.

CONCLUSION

"Standing differs from the other elements of justiciability in that it focuses primarily on the status of the litigant, and only secondarily on the issues he wishes to have adjudicated." *Americans United for Separation of Church and State v. United States Department of Health, Education and Welfare*, 619 F.2d 252, 254-55 (1980). As stated in *United States ex rel. Chapman v. Federal Power Comm.*, 345 U.S. 153, 156 (1953), standing doctrines have been "more or less determined by the specific circumstances of individual situations." Here the Court has been presented with a situation where the law of standing needs to be further clarified.

Respectfully submitted,

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